89- 1459

No.: _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL VINCENT LANESE,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether petitioner Lanese was deprived of his Sixth Amendment right to confrontation, as well as cross-examination contemplated by Rules 607 and 608(b), F.R.E., when defense counsel was totally prevented from cross-examining the sole substantive witness at his trial concerning (1) the witness's prior larceny and extortion of another individual; and (2) the witness's anticipation that he would, because of his testimony against petitioner, then be able to obtain restitution of his past gambling losses?

List of Parties

Apart from petitioner, the following individuals were defendants in the trial from which this petition arises: Thomas Romano and Joseph Iannucci.

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MICHAEL VINCENT LANESE,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Michael Vincent Lanese respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on November 29, 1989 affirming petitioner's conviction for conspiracy to extort and extortion arising from sports gambling.

Opinions Below

The Opinion of the Court of Appeals is reprinted in Appendix A at pages 1a-19a. The Order of the Court of Appeals denying petitioner's petition for rehearing appears in Appendix B at pages 20a-21a. The decision of the district court, together with the pertinent testimony and colloquy, appears in Appendix C at pages 22a-55a.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on November 29, 1989. A timely petition for rehearing was denied on January 17, 1990. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND RULE PROVISIONS

The Sixth Amendment of the United States Constitution states in pertinent part:

> In all criminal prosecution, the accused shall enjoy the right to be confronted with the witnesses against him;...

Rule 607 of the Federal Rules of Evidence states in pertinent part:

> The credibility of a witness may be attacked by any party...

Rule 608(b) of the Federal Rules of Evidence states, in pertinent part:

> (b) **Specific instances of conduct.-** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness...

STATEMENT OF THE CASE

Michael Vincent Lanese petitions this Court following the affirmance by the Second Circuit Court of Appeals[1] of his conviction for extortion and conspiracy to extort (18 U.S.C. §894(a)(1)). Petitioner, a first-time offender, is currently serving a guidelines sentence of six years and four months.

STATEMENT OF THE FACTS

(1)

This was a criminal prosecution which, insofar as it involved the petitioner, depended almost exclusively upon the credibility of the government's informant witness, Eugene P. Golino, a high-stakes gambler.

Golino testified that during the period between late 1986 through Thanksgiving 1987, he regularly placed large bets on sporting events with several different bookmakers from both Bridgeport and New Haven, Connecticut. By the beginning of December, 1987, having won, lost, and won against several hundreds of thousands of dollars, Golino found himself heavily in debt to the bookmakers. He owed roughly $28,000 to the New Haven bookmakers, $55,000 to petitioner's co-defendant Romano, and approximately $25,000 jointly to the co-defendant Iannucci and petitioner Lanese. Shortly thereafter, with no immediate prospect of repaying his gambling indebtedness, Golino decided to become an informant for the FBI; that occurred in January, 1988.

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1. The panel of judges for the circuit court consisted of active circuit Judges Winter and Mahoney. Judge Re, of the Court of International Trade, who was sitting by designation, was the third member of the panel; he authored the opinion of the Court of Appeals.

(2)

Prior to 1987 and long before he knew petitioner, the witness Golino had been arrested for larceny in the first degree and, along with his father-in-law, was charged with having extorted several thousand dollars from a Connecticut man named Anthony Kicska (26a). In essence, Golino was a loanshark. The evidence concerning the witness Golino's involvement in that criminal episode was developed in the district court during the course of a proffer by petitioner's counsel as well as testimony received, outside the presence of the jury, from the witness Golino (34a-49a).

In brief, it was established that Golino and his father-in-law had loaned money to Kicska at an extortionate rate of interest (100 per centum, yearly) (35a). When Kicska was slow in paying his indebtedness, Golino and his father-in-law, a man named Caposella, went to Kicska's home where Kicska was threatened with serious physical harm (36a). Thereafter, Mr. Kicska reported his predicament to the local police in Connecticut and the arrests of Golino and Caposella followed. Eventually, the prosecution was abated and no conviction resulted (38a-39a). That occurred when Golino and Caposella agreed to make restitution to Kicska (36a; cf. 37a).

In his testimony below, the witness Golino maintained that he was completely innocent of the charges engendered by Kicska's complaint, that the money he had loaned to Kicska was "sort of like a setup in a divorce" (45a), and that he agreed to make restitution even though he owed no money to Mr. Kicska and never extorted him (46a).

The trial court, after hearing this evidence and the defense proffer, determined that, because the arrest of the witness Golino had been expunged, and because "we're not really dealing with [Golino's] state of mind right now" (50a), that "inquiries on this matter shall be foreclosed" (55a).

Because of that ruling, defense counsel for petitioner Lanese was unable to draw to the jury's attention, in substance: that Golino had once been a loanshark, that he had once extorted payment from a victim, that he had essentially acknowledged his past criminal responsibility by paying restitution to his victim and, finally, that he was prepared to falsely minimize his past criminal conduct.

(3)

It was common ground at the trial that Golino's credibility was vital to the government's case against the petitioner Lanese. Whereas the numerous tape recorded conversations with the co-defendant Romano and, to a lesser extent, Iannucci, were replete with threats and innuendos of possible physical harm, there was no such evidence against petitioner. Instead, in order to find petitioner guilty of the extortion, the jury had to be satisfied that the witness Golino was truthful in his recounting of the only two times that he met and spoke with petitioner.

The first time was in December, 1987, before Golino went to the FBI. On that occasion, at petitioner's behest, Golino signed a promissory note which recited that he owed petitioner $80,000. (At trial, petitioner's defense was that he believed he would collect the gambling indebtedness by a lawsuit on that note; indeed, he commenced a lawsuit long before the existence of the FBI investigation became known). According to the witness Golino, petitioner displayed a holstered gun at that first meeting. This was denied by the defense.

The second meeting between petitioner and the witness Golino occurred in late January, 1988; it followed the bulk of the recorded conversations between Golino and petitioner's co-defendants, Romano and Iannucci. To that point, Golino had still not repaid any part of the gambling debt; petitioner had still not commenced his lawsuit on the promissory note. According to Golino (and, once again, this was sharply disputed

by the defense), petitioner grabbed him "by the throat, and he started shoving me up against the fence." According to Golino, petitioner Lanese then said, "You'd better have my money if you know what's good for you." According to Golino, petitioner also made another remark to the effect that Golino would find himself in an early grave. That meeting was under the partial surveillance of FBI agents; they observed, apparently, none of the physical conduct attributed by Golino to petitioner for no such testimony was elicited.

(4)

In sum, the evidence of extortion against petitioner Lanese depended entirely upon the jury's assessment of Golino's credibility. Indeed, that has been implicitly recognized by the government which advanced no harmless error argument in the Court of Appeals and, instead, relied upon the argument that the district court was correct in its total preclusion of the proffered line of cross-examination.

REASONS FOR GRANTING THE WRIT

PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESS GOLINO WAS ABROGATED WHEN THE TRAIL JUDGE TOTALLY PRECLUDED CROSS-EXAMINATION CONCERNING HIS PRIOR LARCENOUS EXTORTION OF THE KICSKA VICTIM AND HIS SPECIFIC MOTIVE TO FABRICATE ARISING FROM HIS ANTICIPATION OF OBTAINING RESTITUTION SHOULD PETITIONER BE CONVICTED.

In *Alford v. United States,* 282 U.S. 687, 692 (1931), this Court observed that the essence of a fair trial is denied where defense counsel is denied "the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, with which the jury cannot fairly appraise them." In this prosecution, the "essence" of the

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prosecution case against petitioner was based upon persuading the jury that the witness Golino was credible in his assertions concerning the petitioner's conduct and words on two occasions which were not otherwise corroborated.

To accomplish its purpose in skewing the credibility of its main witness, the government succeeded in persuading the trial judge that the decisive issue was whether the record of the witness' arrest for larceny and extortion had been expunged from local arrest records (it had). It was for that reason that the trial judge, derailed from the proper focus of the inquiry, abruptly curtailed defense arguments that Golino's past history of loansharking bore on his state of mind, for example, whether Golino was ever in fear of petitioner,[2] or whether the incident

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2. The trial judge responded as follows (50a):

> Well, we're not really dealing with state of mind right now. We're dealing with the admissibility of any such information, or any record, or any such inquiry.

Earlier the district judge had stated (47a):

> "Perhaps we should try to limit ourselves to some extent to the nature of the charges, how they were disposed of and what we can find out about that. That's the threshold concern."

Plainly, the district court's preeminent concern was whether the abatement of the prosecution against Golino involved the principle of expungement which the Court itself had written about at length in the case of *Penfield v. Venuti*, 589 F. Supp. 250, 253-54 (D.C. Conn. 1984) (Cabranes, *J.*). The district judge did not, therefore, even consider any of the factors which are normally associated with the curtailment or limitations of cross-examination as, for example, are mentioned in *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("...harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant").

(footnote continued on following page)

with Mr. Kicska could properly be explored to determine, under Rule 607, F.R.E., whether there arose from that experience any special motive, bias, or reason to testify falsely with respect to petitioner; or further, whether Golino's past criminal conduct was "probative of truthfulness or untruthfulness..." Rule 608(b), F.R.E.

In its consideration of petitioner's appellate claims, the Court of Appeals offered a truncated discussion of the serious legal issues and obscured the record of the trial and the argument advanced by appellate counsel.

In holding that the district judge's ruling was correct, the Court of Appeals decided that because Golino had extorted money from a "relative[] or acquaintance[]" and because the underlying debt between Kicska and Golino "did not involve illegal gambling debts" (7a), the prior incident was not appropriate for inquiry upon cross-examination. The Court of Appeals cited no authority in support of that remarkable and unprecedented determination. Nor did it cite any authority for its statement that it was enough for the jury to know that Golino was a compulsive gambler, owed money to the IRS and others and that, having "had the benefit of observing Golino's demeanor," (7a), it would not have made any difference if the jury also knew that Golino himself had once been the central participant in a fraudulent extortion scheme.

Quite simply, the decision of the Court of Appeals on the cross-examination issue and on the consequent deprivation of petitioner Lanese's Sixth Amendment right of confrontation was reached without any reasoned consideration of the compelling issues which, in the light of clear Supreme Court precedent, had been framed from the record in the appellate

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(footnote continued from the preceding page)

Of course, as made clear by *Davis v. Alaska*, 415 U.S. 308, 317, n.5 (1974), Golino's state of mind was exactly the issue; it was an issue which was not only untreated by the district court, it was expressly rejected as a consideration, at the urging of the prosecution.

briefs. Indeed, the opinion of the Court of Appeals silently eschewed the teaching of its own decision in *United States v. Harvey,* 547 F.2d 720, 723 (2d Cir. 1976), where the Court remarked:

> Although the scope of a defendant's right to introduce evidence of bias is not limitless, and may be restricted as the trial court in its sound discretion deems proper, [citation omitted] *it is rarely proper to cut off completely a probative inquiry that bears on a feasible defense* [citation omitted; emphasis added]

That distillation of the case law in *Harvey* was also at work in this Court's analysis in *Delaware v. Van Arsdall, supra.*

In *Van Arsdall,* the trial court had prevented defense counsel from cross-examining a prosecution witness, one Fleetwood, about a criminal charge against him, "being drunk on a highway," which had been dismissed after he had agreed to speak with the prosecution about the murder for which Van Arsdall was eventually charged. The witness, though acknowledging during a voir dire outside the presence of the jury that the charges were dropped as a *quid pro quo* for his assistance, denied that the agreement had affected his testimony. The trial court, after citing Delaware's virtually identical equivalent to Rule 403, F.R.E. ("Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time"), discretionally barred any cross-examination about the agreement.

In *Van Arsdall,* this Court initially focused on Delaware's claim that the confrontation clause had not been violated in the first instance. The Court first noted that a trial judge is not prevented by the Sixth Amendment "from imposing...limits on defense counsel's inquiry into the potential bias of a prosecution witness," and that they retain "wide latitude" to (475 U.S. at 679):

> impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

This Court, however, underscored that, while "wide latitude" may involve "limits," it does not include total foreclosure; the Court stated (*id.*):

> In this case, however, the trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge. By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in this testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause. [footnote omitted; emphasis in original]

The total preclusion by the trial judge in *Van Arsdall* was unrelieved, therefore, by any considerations of a supposed discretion; indeed, the Court's opinion in *Van Arsdall* contains no discussion of that factor as one which would militate against its conclusion that the confrontation clause had been violated.

Furthermore, the *Van Arsdall* Court also rejected the State's argument that "prejudice" at the trial, beyond the particular witness, should be shown before the confrontation clause is held violated by virtue of the excluded cross-examination. The Court stated (475 U.S. at 680):

> We disagree....[T]he focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on a particular

> witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska,* 415 U.S., at 318. Respondent has met that burden here: A reasonable jury might have received a significantly different impression of Fleetwood's credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.

A. Golino's Significance As A Prosecution Witness.

In this case, the sole evidence that petitioner Lanese had engaged in extortionate conduct came from Golino's uncorroborated testimony. There was no tape of the alleged verbal threats by Lanese nor any observation by surveilling FBI agents of a physical threat by him. Without that evidence, no crime of extortion existed. Thus, for exampie, the jury's conclusion that Lanese, in late January, 1988, had "grabbed" Golino by the throat, was based solely on the jury's acceptance of Golino's testimony that such an occurrence had happened.

The Court of Appeals, however, totally ignored the solitary and otherwise unsupported character of Golino's testimony.[3]

B. The Basis For The District Court's Ruling.

The district court, when the cross-examination issue had been raised by government counsel, was gulled into thinking that the only legal issue was whether Golino could properly be cross-examined about an arrest which was subsequently expunged. So, when defense counsel at trial started to urge that Golino's prior loansharking activity reflected on Golino's overall credibility as well as his specific bias or motive to lie, the trial court immediately shut down those arguments with the remark: "Well, we're not really dealing with state of mind right now. We're dealing with the admissibility of any such information, or any record, or any such inquiry" (50a). That, in turn, was quickly followed by the district court's decision that "inquiries on this matter shall be foreclosed" (55a). The district court, therefore, never even considered whether cross- examination could proceed on the bases provided for under the Sixth Amendment confrontation clause and the Federal Rules of Evidence.

It is because of that state of the record, which so compels this Court's review, that one finds, shockingly, that the Court of Appeal's opinion is totally devoid of any reference to what, indeed, was the *government's* main appellate position, i.e., that the district court ruling was sustainable as an exercise of "discretion." The fact was, as the Court of Appeals never

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3. Misleadingly, the opinion below states (7a): "Furthermore, the tapes and underlying circumstances in this case provide significant evidence of threats of violence against Golino." Those "tapes," however, and "underlying circumstances" existed only with respect to the defendant Romano; with respect to petitioner Lanese, there was no evidence, apart from Golino's testimony, that petitioner had engaged in what Golino said he had. The sole recognition by the Court of Appeals of that state of affairs can be gleaned, but barely so, from its statements, i.e., "...according to Golino..." (5a); "According to Golino..." (*id.*) that precede the Panel's description of the evidence of petitioner's alleged threats and conduct.

acknowledged, that the district court never purported to exercise its discretion, considering as it did that the expungement of Golino's arrest was enough to decide the issue in the government's favor. In order, therefore, to escape the intricacies of the record and the requirements of the law, the Court of Appeals avoided the issue by simply ignoring the plain record and not speaking at all about why it was that the district court precluded cross-examination. Because it obscured that unusual feature of the record, the opinion of the Court of Appeals did violence to basic constitutional principles.

C. The Issue Of Total Preclusion.

It had been urged by petitioner upon the Court of Appeals, correctly so, that it is a settled principle of the Second Circuit, that "...it is rarely proper to cut off completely a probative inquiry that bears on a feasible defense" (citation omitted), *United States v. Harvey, supra,* 547 F.2d at 723. Similarly, this Court in *Delaware v. Van Arsdall, supra,* 475 U.S. at 679, cautioned against the preclusion of "*all* inquiry" (emphasis in original), on matters which would affect the credibility of a witness.

Despite that well settled authority, the Court of Appeals decision proceeded as if written on a blank slate; as if that settled principle of its own circuit, as well as the express caution in *Van Arsdall,* had no application to what occurred at this trial. It is never discussed in the opinion of the Court of Appeals. Instead, substituting speculation for analysis, the Court of Appeals justified its ruling upon a series of disjointed, irrelevant and unsupported assertions concerning the record, ignoring altogether the teaching of the *Van Arsdall* and *Harvey* cases.

(1)

For example, the Court of Appeals made the observation that "the circumstances of the Kicska incident...[were] far from clear" (7a). That the "circumstances" might have been clearer had cross-examination been permitted seems the obvious response to that non-sequitur. Plainly, the "circumstances" of the "incident" were clear enough following the proffer to have prompted *any* court, trial or otherwise, to immediately recognize that Golino's loansharking activities, his attempted extortion, the restitution and his false protestations of innocence, had easily reached the threshold where at least *some* cross-examination should have been permitted. That there may have remained, following the extensive proffer, some open questions hardly detracted from the manifest necessity of permitting the jury and not the Court of Appeals to make any further assessments concerning whether Golino's efforts to minimize the incident were credible to any degree.

(2)

The Court of Appeals also observed, by way of support for its decision, that the Kicska incident did not involve illegal gambling debts whereas the underlying debts in this prosecution did involve illegal gambling (7a). Did the Court of Appeals really mean to suggest that, if the government had urged that distinction upon a jury before whom Golino's past criminal misconduct *had* been aired, such a jury would have considered the distinction at all significant in deciding whether Golino was a truthful witness? We think not; if so, then to state the argument is to refute it. Indeed, if the jury knew that the underlying debt between Golino and Kicska was a loan at an interest rate of 100%, whatever distinction that may exist between the character of the underlying indebtedness would have been to the cross-examiner's benefit.

(3)

Similarly, would the jury have drawn a useful distinction from the statement made by the Court of Appeals that the crimes committed on Mr. Kicska "...apparently arose from a dispute among relatives or acquaintances" (7a), as the Court of Appeals suggests, where the interest rate that Golino charged on the loan was usurious? "Acquaintance" and "relationship" have never been defenses to usury and extortion. How then, could those factors possibly have been interposed in this setting by the Court of Appeals?

(4)

The Court of Appeals also decided that it was "highly improbable" (7a), that when Golino went to the FBI and became a cooperating witness, he may have been motivated by a desire to obtain restitution of his prior gambling losses. Once again, of course, that was a conclusion which had never been considered, let alone reached by the district court nor was it even remotely a basis for the district court's ruling (i.e., "...we're not really dealing with state of mind right now") (50a).

Whether or not Golino's desire to obtain all or partial reimbursement for his past gambling losses played a role in his "cooperation" with the FBI was a matter peculiarly suited for assessment by the jury, not for decision by an appellate court in the first instance. The page limitations of this petition make it impossible to set out the startling similarity of conduct that Golino adopted from the prior Kicska experience. So, for example, in assessing whether Golino left the State of Connecticut out of supposed fear of the defendants, the jury might have found it instructive to learn that Kicska had also left Connecticut out of fear of Golino (36a). Had not Golino, therefore, simply borrowed that dramatic response by Mr. Kicska to lend credence to his otherwise fabricated assertion that the petitioner Lanese had physically threatened him?

As to the supposed "improbability" that Golino was motivated by a desire to obtain restitution, as Kicska had, we think it is enough to point out that, following the convictions in this prosecution, Golino contacted the Probation Department in an effort to obtain "possible restitution, for [his] gambling losses." (See Transcript of Sentencing of Thomas Romano at p.10; Joint Appendix at A.1835). Not so improbable that it did not eventually happen. Of course, that there may have been a distinction, as the Court of Appeals observed, between the amounts involved in the two situations ("In contrast, Golino's debts to Lanese and Romano...were for a much higher amount than Kicska's" (7a)), is no difference at all.

D. The Court of Appeals' Mischaracterization Of Petitioner's Argument That Golino's Prior Misconduct Was Subject To Cross-examination Under Rule 608(b), F.R.E.

Petitioner had argued that Golino's conduct in loaning money to Kicska at usurious interest rates was essentially a larceny and a fraud which was subject to inquiry under Rule 608(b), F.R.E., because it was a "specific instance[]" of conduct which was probative of Golino's "truthfulness or untruthfulness." See, e.g., Lanese Reply Br. at 11-15; Romano Br. at 17-22. The government's argument had been that Golino's misconduct involved "force" and "intimidation" and, therefore, did not fall within Rule 608(b).

The Court of Appeals avoided the resolution of that issue by obscuring it altogether. Thus, the Court of Appeals stated that the defense argument was that they "had been denied a fair trial because of the court's refusal to permit cross-examination of Golino's previous arrest..." (7a). That, however, was not the argument advanced by petitioner and his co-appellant, Romano. As was perfectly obvious from the arguments advanced by counsel to the Court of Appeals, the fact that Golino was arrested played a very small part in the defense position and, indeed, not even the government

continued to maintain, as the government's trial attorney had, that the real "forbidden" purpose of the cross-examination was to parade Golino's subsequently expunged arrest before the jury.

The Court of Appeals then stated that, because Golino "admitted that he was a compulsive gambler," and was heavily in debt (7a), that somehow the jury had enough information to evaluate his credibility from the defense perspective. Those features of Golino's character, as well as his "enroll[ment]" in the Federal witness protection program," *id.*, which was also remarked upon by the Court of Appeals, were hardly factors which detracted from Golino's credibility. Indeed, the presence of those factors in the prosecution's case, combined with the absence of the evidence of Golino's prior criminal conduct, enabled the government to misleadingly present Golino to the jury as a sympathetic, "victimized gambler," much as had been done with the witness in *Davis v. Alaska, supra,* 415 U.S. at 318, whom the prosecutor had presented as "an apparently blameless witness" whose credibility was under "speculative and baseless" attack by defense counsel.

One cannot escape the constitutional irony, therefore, in a situation where a state of affairs that obviously should have placed the prosecution in a defensive position has now, because the Court of Appeals ignored the plain requirements of *Davis v. Alaska, supra,* been used as a makeweight against the sound legal position of petitioner. But, even if the Court of Appeals' position were taken upon its own terms, it is clear from *Delaware v. Van Arsdall, supra,* 475 U.S. at 680, that because the jury "might have received a significantly different impression of [Golino's] credibility..." had petitioner's trial counsel been permitted to cross-examine him on the Kicska incident, it is no answer to the *confrontation* argument that Golino may have had a flawed character, as evidenced by his compulsion to gamble.

Delaware v. Van Arsdall, supra, 475 U.S. at 684, makes it very clear that such a factor may be weighed in connection with a harmless error argument but it has no place in determining whether the confrontation clause has been violated.

In this case, as we have previously noted, the government did not assert a harmless error argument in the Court of Appeals, as plainly it could not. Yet, the sole purpose in speaking, as did the Court of Appeals, of what "[t]he jury learned" about Golino (7a), would be to support a harmless error argument. As stated, however, by this Court in *Delaware v. Van Arsdall, supra,* 475 U.S. at 680:

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska, supra,* 415 U.S. at 318.

Such a violation of the confrontation clause has been stated, with plain certainty, in the case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
March 16, 1990

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1374, 1379 - August Term, 1988

(Argued: July 17,1989 Decided: November 29,1989)

Docket Nos. 89-1079, 89-1133

UNITED STATES OF AMERICA,

Appellee,

-v.-

MICHAEL VINCENT LANESE, et al.,

Defendants,

MICHAEL VINCENT LANESE, a/k/a "VINNIE"
and THOMAS ROMANO, a/k/a "T.R.,"

Defendants-Appellants.

Before:

WINTER and MAHONEY, *Circuit Judges,*
and RE, *Judge.**

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* The Hon. Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

Appeal from judgments of conviction in the United States District Court for the District of Connecticut (Cabranes, Judge), for conspiring to "use extortionate means to collect any extension of credit," and "us[ing] extortionate means to collect any extension of credit," both in violation of 18 U.S.C. § 894(a)(l) (1982).

Affirmed.

PAUL B. BERGMAN, New York, N.Y., for *Defendant-Appellant Michael Lanese.*

JAMES J. RUANE, Bridgeport, Ct. (Meehan & Meehan), *for Defendant-Appellant Thomas Romano.*

J. DOUGLAS WILSON, Department of Justice, Washington, D.C. (Stanley A. Twardy, Jr., United States Attorney for the District of Connecticut, John H. Durham, Boston Strike Force, New Haven, Ct.), *for Appellee.*

RE, *Judge:*

Defendants-appellants, Michael Vincent Lanese and Thomas Romano, appeal from judgments of conviction following a jury trial in the United States District Court for the District of Connecticut. Lanese and Romano were convicted of conspiring to "use ... extortionate means to collect any extension of credit," and "us[ing] extortionate means to collect any extension of credit," both in violation of 18 U.S.C. § 894(a)(l) (1982). Lanese was sentenced to 78 months' imprisonment to be followed by three years' supervised release, and fined $25,000. Romano was sentenced to 72 months' imprisonment, to be followed by three years' supervised release.

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Lanese contends that the district court erred in refusing to admit evidence of an alleged extortionate activity by the government's principal witness, Eugene Golino, and thereby deprived Lanese of his constitutional right of confrontation and a fair trial. Lanese also contends that the district court erred in failing to sever his trial from the other co-defendants, in admitting evidence of previous alleged criminal activity of codefendant Iannucci, and in failing to instruct the jury as to multiple conspiracies. Finally, Lanese contends that the district court impermissibly sentenced him as "a manager or supervisor [of a] criminal activity involv[ing] five or more participants or ... otherwise extensive," pursuant to section 3B1.1(b) of the Sentencing Guidelines.

With the exception of the sentence imposed, we find the contentions of Lanese without merit, and the judgment of conviction is affirmed. Since the district court did not make a specific finding of the identities of the "five or more participants," or that the criminal activity was "otherwise extensive," this court cannot determine whether Lanese's sentence was correctly increased pursuant to section 3B1.1(b). Accordingly, as to Lanese, we remand, for the specific findings required by section 3B1.1(b) of the Sentencing Guidelines.

Romano, in agreement with Lanese, contends that the district court erred in not admitting evidence of the alleged extortionate activity of Golino. Romano further asserts that the district court erred in not admitting a police report as to the destruction of his car. He also contends that the district court erred in having sentenced him as a "manager or supervisor [of a] criminal activity involv[ing] five or more participants or otherwise extensive."

With the exception of the sentence imposed, the contentions of Romano are without merit, and the judgment of conviction is affirmed. Since the district court erred in

sentencing Romano as a "manager or supervisor [of a] criminal activity involv[ing] five or more participants or otherwise extensive," we reverse and remand for a resentencing of Romano.

BACKGROUND

In the fall of 1986, Eugene Golino began placing bets on sporting events with an illegal gambling business run by codefendant Joseph Iannucci, in Bridgeport, Connecticut. Golino incurred a gambling debt of $12,000 to Iannucci. Golino testified that, when he approached Iannucci and told him that he could not pay the debt immediately, Iannucci responded that "[s]omebody would come and see me." Subsequently, Golino was approached by Arnold Plotkin who, according to Golino, "showed me a baseball bat and a gun," and demanded payment of the debt.

After repaying the $12,000 debt owed to Iannucci, Golino continued gambling. He incurred an additional debt of $29,650 to Iannucci in February 1987, and told Iannucci that he could not pay the debt immediately. After being told by Iannucci that he "would get a visitor," Golino was again approached by Plotkin. Golino made monthly payments of $1,600 to Plotkin to pay off the debt owed to Iannucci. In addition, Plotkin advanced Golino $5,000 towards the debt, and demanded weekly payments of $250, as "juice." The $250 payments did not reduce the debts owed to either Plotkin or Iannucci.

In September 1987, Plotkin introduced Golino to Thomas Romano. Plotkin instructed Golino to make his $1,600 monthly payments to Romano. However, Plotkin continued claiming the $250 weekly payments from Golino. After Plotkin was shot to death, Romano demanded the $250 weekly "juice" payments front Golino.

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Golino then began placing bets with a bookmaker referred to him by Romano. After he satisfied his debt to Iannucci, Golino also placed bets with Iannucci's service. By late November 1987, Golino had incurred losses of approximately $55,000 to Romano's bookmakers and $25,650 to Iannucci's bookmakers.

On December 18, 1987, Golino met with Romano at a Bridgeport diner, and paid $5,000 towards his gambling debts. Romano then telephoned Michael Lanese, who joined Romano and Golino at the diner. Lanese, who according to Golino "had a gun on his hip in a brown leather case[,]" asked Golino "[w]here's my money?" Lanese had Golino sign a promissory note, payable to "my friend Michael Lanese" for $80,000, which represented the approximate amount of money owed to both Romano and Iannucci.

In January 1988, Golino approached Federal Bureau of Investigation agents and agreed to cooperate in an investigation of illegal sports betting operations in Bridgeport. Several times during January 1988, Golino, either using a tapped telephone or wearing a concealed tape recorder, discussed his gambling debts with Romano. The tapes revealed that Romano urged Golino to pay his debts, and frequently warned Golino that if he did not pay he would be harmed or killed. On January 29, 1988, Golino and Romano met at a Bridgeport restaurant, and were joined by Lanese and two others. After Romano became suspicious of a vehicle, which was an FBI surveillance van parked near the restaurant, the meeting was moved to a nearby park.

According to Golino, at the park, Lanese "grabbed me by the throat, and he started shoving me up against the fence." Golino testified that Lanese told him "'[y]ou'd better have my money if you know what's good for you. ... If you don't want to be lying next to Arnie Plotkin or visiting him, you'll have my money.'" Subsequently, Golino entered the federal witness protection program.

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On June 23, 1988, Lanese, Romano, and Iannucci were indicted in the United States District Court for the District of Connecticut. They were charged with using "extortionate means to collect and attempt to collect extensions of credit, namely illegal gambling debts," in violation of section 894(a)(1) of title 18 of the United States Code, and for conspiracy to commit the same crime. Plotkin was named as an unindicted co-conspirator. Following a jury trial, although all three defendants were convicted, only Lanese and Romano have appealed.

DISCUSSION

Both Lanese and Romano contend that the district court erred in not permitting them to cross-examine Golino, the prosecution's key witness, about the circumstances surrounding Golino's 1982 arrest for extortion.

In 1981, Golino, acting on behalf of his father-in-law, made several loans to Anthony Kicska, a distant relative by marriage of Golino. When Kicska defaulted on the loan, Golino accompanied his father-in-law to Kicska's place of business. According to Lanese, as Golino "was having a good time laughing about it[,]" Golino's father-in-law threatened to shoot Kicska if he did not repay the loans. Both Golino and his father-in-law were arrested in 1982. The charges were dropped after both Golino and his father-in-law agreed to pay Kicska $5000 each in restitution.

Lanese argues that the district court's refusal to permit cross-examination on Golino's previous arrest deprived Lanese of his sixth amendment right to confront the witnesses against him by denying him the opportunity to cross-examine the key government witness on a matter of bias.

Lanese contends that Golino's past experience with the criminal justice system "showed a specific bias and

motive for Golino to testify falsely against Lanese; i.e., that Golino's motive in seeking the assistance of the FBI was not, as he asserted, fear and protection from perceived physical harm from Lanese, but was inspired by a hope to obtain restitution from Lanese." He further argues that Golino was motivated to "interest" the FBI in the case by "exaggerat[ing] or even mak[ing] up elements of violence and, in the specific case of appellant Lanese, that he saw a gun."

We do not agree. It is highly improbable that Golino believed that, by going to the FBI, he could obtain restitution as Kicska did in 1982. The circumstances of the Kicska incident, although far from clear, did not involve illegal gambling debts, and apparently arose from a dispute among relatives or acquaintances. In contrast, Golino's debts to Lanese and Romano were based on illegal gambling, and were for a much higher amount than Kicska's. Furthermore, the tapes and underlying circumstances in this case provide significant evidence of threats of violence against Golino.

Romano argues that the district court's refusal to permit cross-examination of Golino's previous arrest denied Romano a fair trial because it did not allow the jury "sufficient information by which to assess the credibility of the witness." We disagree. The jury learned, through Golino's testimony, that he was enrolled in the federal witness protection program, and, in exchange for his testimony, received money from the federal government and immunity from the state and federal governments for any gambling prosecutions. Golino admitted that he was a compulsive gambler and owed money to the IRS and to various creditors. Furthermore, in addition to the testimony, the jury had the benefit of observing Golino's demeanor. Thus, on the question of the credibility of Golino, there was enough evidence from which the jury could have passed upon his credibility.

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Both Lanese and Romano object to various evidentiary rulings of the district court. Specifically, Lanese points to the district court's failure to grant his motion for a severance, the admission into evidence of "serious, uncharged criminal conduct by ... Iannucci," and the district court's failure "to instruct the jury with respect to multiple conspiracies."

Before trial, Lanese moved for a severance, pursuant to Rule 14 of the Federal Rules of Criminal Procedure. Lanese did not renew the motion at any point during the trial. In some circuits, failure to renew a Rule 14 motion after the close of all the evidence would result in a failure to preserve the issue for appeal. *See, e.g., United States v. Swift,* 809 F.2d 320, 323 (6th Cir. 1987); *United States v. Loya,* 807 F.2d 1483, 1494 (9th Cir. 1987); *United States v. Mansaw,* 714 F.2d 785, 790 (8th Cir.), *cert. denied,* 464 U.S. 964 (1983). In this circuit, "failure to pursue vigorously the severance issue below increases our reluctance to second-guess the trial court's decision." *United States v. Lyles,* 593 F.2d 182, 192 (2d Cir.), *cert. denied,* 440 U.S. 972, 975 (1979).

On appeal, a trial court's denial of a Rule 14 motion to sever is "virtually unreviewable." *United States v. Friedman,* 854 F.2d 535, 563 (2d Cir. 1988) (quoting *United States v. Stirling,* 571 F.2d 708, 733 (2d Cir.), *cert. denied,* 439 U.S. 824(1978)), *cert. denied,* 109 S. Ct. 1637 (1989). To prevail, "the defendant must show that he or she suffered prejudice so substantial as to amount to a miscarriage of justice." *Id.* (citing *United States v. Bari,* 750 F.2d 1169, 1177 (2d Cir. 1984), *cert. denied,* 472 U.S. 1019 (1985)).

Lanese has failed to show that his joint trial with Romano and Iannucci was "a miscarriage of justice." The tapes introduced at trial, together with Golino's testimony,

provide sufficient evidence to support a jury finding that Lanese, Romano, and Iannucci were involved in a common scheme to extort money from Golino.

As for the district court's failure to instruct the jury on the law of multiple conspiracies, Lanese's failure to request a jury charge on multiple conspiracies, and his failure to object when the court instructed the jury, results in a failure to preserve the issue for appeal. Rule 30 of the Federal Rules of Criminal Procedure provides that "[n]o party may assign as error any portion of the [jury] charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Crim. P. 30. Furthermore, we note that the district court carefully instructed the jury that:

> [i]f you are satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who the members of the conspiracy were. In deciding whether the defendant whom you are considering was, in fact, a member of the conspiracy, you should consider whether, based upon all of the evidence, it appears that the defendant knowingly and willfully joined the conspiracy.
>
> . . .
>
> It is important for you to note that the defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged co-conspirators and the reasonable inferences which may be drawn from them.

The court also carefully instructed the jury on the elements of the crimes charged, and the need to analyze the evidence against each defendant separately.

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Romano contends that the district court erred in not admitting into evidence an investigative report of the Stratford, Connecticut Police Department, dated April 21, 1988, on the alleged arson of Romano's car. The report noted that Romano "stated that he had a possible suspect Gary Tangway (sic)." Gary Tanguay was identified at trial as an associate of Lanese. Romano contends that the police report is evidence of Romano's claim that he "was equally as vulnerable to Lanese's threats as was Golino, and that such threats were actually carried out through Lanese's agent, Gary Tanguay."

Romano cites Rule 803(8)(c) of the Federal Rules of Evidence in support of his contention that the police report should have been admitted. Rule 803(8)(c) admits into evidence "against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8)(c). We find that the court had sufficient grounds to refuse admission of the report, since "the source of information or other circumstances indicate lack of trustworthiness."

The report, and the underlying incident, occurred after all the events alleged in the indictment, and six weeks after a police search of Romano's house. In addition, the contents of Romano's full statement to the officers suggested that he was biased against Tanguay. Romano accused Tanguay of "possibly dealing heroin." He also told the officers "that he would go more into detail[,] as to why he suspected Tangway (sic)[,] with detectives." Furthermore, the record does not reveal that Romano was unable to produce the testimony of the investigating officers or of police detectives. In short, since "the source of information or other circumstances indicate lack of trustworthiness," the district court had sufficient reason to refuse to admit Romano's statement.

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The record reveals ample evidence to justify the jury's findings of guilty on the offenses charged. Since the allegations of error pertain to areas in which the district court had discretion, and no abuse of that discretion has been established, none of the errors attributed to the court warrants reversal. Accordingly, the convictions are affirmed.

SENTENCING

Lanese argues generally that "the district court misconceived its sentencing responsibility under the sentencing guidelines by relegating itself to the mere approval or disapproval of the recommendations of the probation officer who prepared [Lanese's] presentence report ." We disagree. The transcript of the sentencing of Lanese indicates that the court adequately considered the facts and circumstances surrounding Lanese's conviction, including the contents of his handwritten letter to the court, submitted prior to sentencing. The court did not "merely approve or disapprove" the recommendations in the presentence report.

Both Lanese and Romano present more specific objections to their sentences. Lanese contends that the district court erred in its computation of Lanese's "offense level," within the meaning of the Sentencing Guidelines. Lanese argues that the court should have granted him "a downward adjustment because of his acceptance of responsibility." Both Lanese and Romano contend that the court incorrectly increased their offense levels because Lanese possessed a gun during the commission of the crime, and because they acted in a managerial or supervisory capacity in a criminal activity involving five or more participants.

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Lanese and Romano were sentenced pursuant to the Sentencing Guidelines established by the United States Sentencing Commission. *See* 28 U.S.C. Sec. 994(a) (Supp. 1987); *see generally,* 28 U.S.C. Sec. 991 et seq. (Supp. 1987). Section 3553(b) of title 18 of the United States Code provides that the district court "shall impose a sentence of the kind, and within the range, referred to in [the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b) (1988). A defendant may appeal from a sentence "imposed as a result of an incorrect application of the sentencing guidelines...." 18 U.S.C. Sec. 3742(a)(2) (1988).

On review of sentences imposed under the Sentencing Guidelines, "[t]he court of appeals shall accept the findings of fact of the district court unless they are clearly erroneous...." 18 U.S.C. Sec. 3742(e) (1988). The determination of the application of a Sentencing Guideline is a question of fact, entitled to the "clearly erroneous" standard of review. See *United States v. Herrera,* 878 F.2d 977, 1000 (7th Cir. 1989) (district court determination that defendant was "an organizer" within section 3B1.1(c) is "a fact question," and is entitled to the "clearly erroneous" standard of review); *United States v. Ortiz,* 878 F.2d 125, 126-27 (3rd Cir. 1989) (district court determination that defendant was "an organizer or leader" within section 3B1.1(b) is "essentially factual," and is entitled to the "clearly erroneous" standard of review); *United States v. Wright,* 873 F.2d 437, 443-44 (1st Cir. 1989) (district court determination that defendant was not a "minimal" or "minor" participant within section 3B1.2 is "essentially factual," and is entitled to the "clearly erroneous" standard of review); *United States v.*

Mejia-Orosco, 867 F.2d 216, 220-21 (5th Cir.) (district court determination that defendant was "an organizer, leader, manager, or supervisor" within section 3B1.1(c) is "a factual finding," and is entitled to the "clearly erroneous" standard of review), *cert. denied,* 109 S.Ct. 3257 (1989).

The Sentencing Guidelines direct the district court to determine the "offense level" of a convicted defendant. *See* United States Sentencing Commission, *Federal Sentencing Guidelines Manual* Sec. 1B1.1(b) (1988). A defendant's offense level is determined by finding the "base offense level" established for the particular crime and adding any adjustments to the offense level, according to the circumstances of the crime, the number of counts of the conviction, "the defendant's acceptance of responsibility," and the defendant's criminal history. *See* Sec. 1B1.1; *see also* Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest,* 17 Hofstra L. Rev. 1, 6-7 (1988).

Pursuant to section 2E2.1(a), both Lanese and Romano were given base offense levels of twenty for their convictions. The offense levels were increased to twenty-three, pursuant to section 2E2.1(b)(1)(C), because "a firearm was possessed" during the crime, specifically, during the December 18, 1987 meeting with Golino. Lanese argues that, since he was licensed to carry a handgun and he did not use or display the handgun during the meeting, the court incorrectly increased his offense level. Romano contends that his offense level should not be increased by Lanese's possession of a gun, and cites tapes of one of his conversations with Golino, introduced at the trial by the government, in which he denies knowing in advance that Lanese would be carrying a weapon at the December 18 meeting.

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We disagree with the contentions of both Lanese and Romano. Section 2E2.1(b)(1)(C) specifically states that "if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels." In plain language, the section applies to both Lanese and Romano. It is satisfied by mere possession of the firearm during the crime, and does not require the particular defendant to have been in possession. Furthermore, the applicable definition of "firearm" does not exclude licensed handguns. See Sec. 1B1.1, application note (1)(e) ("'Firearm' means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive.").

Lanese argues that the court should have reduced his offense level by two, pursuant to section 3E1.1(a), because he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." In support of his contention, Lanese refers to a handwritten letter to the court prior to his sentencing, in which he acknowledged being involved in illegal gambling. Lanese notes that "even at the trial, when the issue was fraught with more significance and without any separate incentive, appellant Lanese acknowledged that the Golino indebtedness arose from gambling losses."

A complete reading of section 3E1.1, however, reveals that Lanese has not "accepted responsibility" within the meaning of that section. The Sentencing Commission suggests that, in determining whether a defendant has "accepted responsibility," the court should consider, among other factors, whether the defendant has made a "voluntary and truthful admission to authorities of involvement in the offense and related conduct...." Sec. 3E1.1, application note (1)(c). Additionally, "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review

and should not be disturbed unless it is without foundation." Sec. 3E1.1, application note (5).

The sole factor that arguably may support Lanese's claim that he "accepted responsibility" is that he admitted "involvement in the offense and related conduct." However, Lanese's only admissions, in the letter and at trial, were to illegal gambling. He never "accepted responsibility" for the offenses charged, namely using and conspiring to use extortionate means to collect illegal gambling debts. Clearly, Lanese was not entitled to a downward adjustment of his offense level, as permitted by section 3E1.1.

Romano contends that he was not "a manager or supervisor," within the meaning of section 3B1.1(b), and, thus, "the adjustment found by the Court was erroneous as to the role played by the defendant...." In contrast, the government asserts that "Romano apparently supervised the two bookies who took bets from Golino in the fall of 1987." In support of its assertion, the government referred to several statements made by Romano to Golino, contained in the tapes introduced at trial.

In response to Golino's protestations that he could not pay his debt, Romano responded "you know how many times I hear this." At another point, Romano is heard separating papers and money and telling Golino "[t]his is yours." Then, after a pause, Romano states "[t]he other guys...." The government asserted that these comments "suggest that Mr. Romano was involved in the collection of monies owed by any number of people for this enterprise; that he was not simply a runner in connection with this debt owed by Mr. Golino." The government also refers to comments made by Romano, and contained in the tapes introduced at trial, that he "received orders" from "Danbury" or "New York."

In addition, the evidence showed that Romano visited a federal prison in Danbury to meet with Vincent Esposito. According to the testimony of an FBI agent,

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Esposito previously "ran the sports bookmaking business for the Greater Bridgeport area." There was also evidence that, in the fall of 1987, Romano referred Golino to a bookmaker.

The evidence supports a finding that Romano was part of a criminal organization, and that he was engaged in a practice of using extortionate means to collect illegal gambling debts. It does not, however, support a finding that Romano was "a manager or supervisor" of the organization. There is no evidence, in the record before this court, to support the government's assertion that Romano "managed" or "supervised" the bookmakers, or that he had authority over anyone else involved in the conspiracy. Hence, the district court's finding that Romano was "a manager or supervisor," within section 3B1.1(b), was "clearly erroneous." Accordingly, Romano's sentence is reversed and the case is remanded, as to Romano, for resentencing.

Lanese contends that the court incorrectly increased his offense level by three, pursuant to section 3B1.1(b), because he was "a manager or supervisor and the criminal activity involved five or more participants or was otherwise extensive...." It is not disputed that Lanese acted as "a manager or supervisor." Lanese, however, asserts that the criminal activity did not "involve[ ] five or more participants."

In support of his contention, Lanese stresses that the indictment lists only four conspirators, Lanese, Romano, Iannucci, and Plotkin, and thus section 3B1.1(b) does not apply. The district court, which determined that "the criminal activity involved five or more participants," did not list or identify the participants. For purposes of section 3B1.1(b), a " 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." Sec. 3B1.1, application note (1).

As the government correctly notes in its brief, the testimony established that at least three bookmakers

received bets for Lanese and Iannucci, over the telephone. Hence, the evidence clearly shows that at least five persons were involved in the illegal gambling operations. The government presented no evidence, however, showing that the bookmakers participated in, or had knowledge of, the use of extortionate means to collect illegal gambling debts, the crime charged.

The government also notes that "at the meetings attended by Lanese, Gary Tanguay and another unidentified man appeared to be serving as guards or backup for Lanese." The government's assertion, that the "five or more participants" included Tanguay and another unidentified man, appears to be speculation. The only evidence which supports the government's assertion is the testimony of FBI agents, who observed the two men during surveillance of Lanese.

Finally, the government contends that the "testimony at trial ... suggested that Vincent Esposito, an inmate at the Federal Correctional Institution at Danbury, played a role in the collection of Golino's debt." The only evidence tying Esposito to the crime was that Romano, and one of the bookmakers, visited Esposito in prison, and that Romano apparently referred to Esposito when he told Golino, on tapes introduced at trial, of receiving orders from "Danbury."

At trial, the government presented tapes of the conversations between Esposito and Romano. The tapes consisted mainly of discussions about Esposito's family. Romano's statements to Golino, concerning orders from "Danbury," do not plainly refer to Esposito. Even in the context of Romano's visits to Esposito in Danbury, Romano's statements are insufficient to show that Esposito was a "participant" in the crime charged.

Since, on the record before this court, it is unclear whether there is sufficient evidence to support the district court's determination as to the number of "participants," for purposes of section 3B1.1(b), we remand to the district

court for a specific finding as to the identities of the "participants."

We recognize that requiring a district judge to make specific factual findings in determining the applicable sentencing guidelines may "interfere with the smooth operation of the sentencing hearing." *Mejia-Orosco,* 867 F.2d at 221. It cannot be disputed, however, that "[s]pecific findings will both guide reviewing courts to the evidentiary basis for sentencing judgments, and also help the trial judge to identify matters relevant to application of the guidelines." *Id.* at 221-22; *see also Herrera,* 878 F.2d at 1002.

The government, alternatively, argues that "the evidence would support a finding that the criminal activity was 'otherwise extensive'" within the meaning of section 3B1.1(b). The government contends that "the evidence showed a widespread bookmaking operation that routinely resorted to extortion to collect debts." Specifically, from the tapes introduced at trial, the government refers to several comments of Romano, in which he hinted that he collected illegal gambling debts from persons other than Golino. The government also refers to betting slips found on Iannucci, apparently referring to bets other than those of Golino.

We do not doubt that Lanese and Iannucci's bookmakers may have accepted bets from persons other than Golino. The district court, however, based its section 3B1.1(b) upward adjustment of the offense level on a determination that there were five or more participants in the crime. Accordingly, we cannot determine whether the activity was "otherwise extensive." On remand, the district court may make the appropriate finding.

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CONCLUSION

Since the record reveals sufficient evidence to justify the jury's findings of guilty on the offenses charged, and none of the errors alleged by Lanese and Romano warrant reversal, the judgments of conviction are affirmed.

Since the district court did not make a specific finding as to the identities of the "five or more participants" involved in the criminal activity, or that the criminal activity was "otherwise extensive," this court cannot determine whether Lanese's offense level was correctly increased by three points pursuant to section 3B1.1(b). Accordingly, as to Lanese, the case is remanded for specific findings required by section 3B1.1(b).

Since Romano was not "a manager or supervisor," his offense level was incorrectly increased by three points pursuant to section 3B1.1(b). Hence, as to Romano, his sentence is reversed, and the case is remanded for resentencing.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of January, one thousand nine hundred and Ninety.

FILED: January 17, 1990

Docket Numbers 89-1079, 89-1133

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL LANESE, et al.,

Defendants,

THOMAS ROMANO, a/k/a "T.R." and
MICHAEL VINCENT LANESE,
a/k/a "VINNIE,"

Defendants-Appellants.

A petition for rehearing containing that the action be reheard in banc having been filed herein by counsel for the defendant-Appellant, MICHAEL VINCENT LANESE,

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Rehearing In Banc

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/_____
ELAINE B. GOLDSMITH
Clerk

Appendix C
Excerpts of Trial Transcript with Opinion of United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

vs.

MICHAEL VINCENT LANESE, a/k/a "VINNIE," THOMAS ROMANO, a/k/a "T.R." and JOSEPH IANNUCCI, a/k/a "JOEY I's"

CRIMINAL B-88-24 (JAC)

DECEMBER 8, 1988
NEW HAVEN, CONNECTICUT

B E F O R E:
HON. JOSE A. CABRANES, U.S.D.J.
and a Jury of Twelve.

THIRD DAY OF TRIAL

Appendix C
Excerpts of Trial Transcript with Opinion of United States District Court

Appearances:

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Paul Collard
Official Court Reporter.

Appendix C
Excerpts of Trial Transcript with Opinion
of United States District Court

(In the absence of the Jury)

THE COURT: Good morning.

MR. DURHAM: Good morning, your Honor.

THE COURT: When we concluded yesterday's session, counsel were invited to submit this morning proposed cautionary or limiting instructions to the jury on the matter that we've been discussing.

Do you have any such instruction?

MR. DURHAM: Your Honor, I would indicate to the Court, our word processor is just back up and running. We have a handwritten proposed instruction. The typewritten version is being typed as we speak.

THE COURT: We don't do handwritten instructions.

MR. DURHAM: Yes, your Honor, I know.

THE COURT: Do defense counsel have anything?

MR. RUANE: Defendant Romano does not.

MR. RICCIO: The defendant Iannucci does not, your Honor.

MR. KELLY: Defendant Lanese does not.

THE COURT: Fine. I'll do my own, then. Fine.

MR. DURHAM: Yes, your Honor.

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THE COURT: All right. Let's go. Let's bring the witness in.

E U G E N E P. G O L I N O, Resumed, having been previously duly sworn, was further examined, and testified as follows:

MR. DURHAM: Your Honor, while we're waiting, I might indicate to the Court that this morning the Government has filed a motion in limine, copies of which have been provided to counsel for the defendants in this matter. The Government would request that that motion be heard prior to the time the cross-examination begins.

THE COURT: What is this?

MR. DURHAM: As reflected in the submission or the pleading itself, your Honor, it has come to my attention that at least Mr. Ruane, I'm not sure whether the other counsel have similar intentions, but it's Mr. Ruane's intention to attempt to cross-examine Mr. Golino with respect to a prior arrest which did not result in any conviction.

The Government submitted a motion in limine, with accompanying case law, which the Government believes is compelling with respect to the impropriety of such cross-examination.

THE COURT: When was this finished?

MR. DURHAM: That was finished yesterday, your Honor, and I had intended to file it yesterday afternoon, and then when we broke everybody was gone, so I delivered copies to counsel this morning and certified it this morning. And I've provided the original to the Clerk this morning.

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THE COURT: We'll have to pause to read this.

Have counsel received copies?

MR. RUANE: Yes, your Honor.
MR. RICCIO: Yes, your Honor.

(Pause)

THE COURT: So far it doesn't seem as compelling to me as it seems to you.

MR. DURHAM: Yes, your Honor.

THE COURT: None of these cases seem to be on point, or directly on point, and I would think that this particular issue is not one with which the courts in the Second Circuit are unfamiliar. All of which suggests that applications of this sort have not been given consideration by the Courts of Appeals. Is that possible?

MR. DURHAM: I don't believe that's the case, your Honor. I think that __

THE COURT: Tell me which case is on point. What's the crime, first of all?

MR. DURHAM: As I understand the situation, and I don't have access to the records because of the applicable Connecticut erasure statute, but as I understand, there is an underlying arrest involving a domestic situation in 1982. The underlying offense being, I believe, larceny 1 by extortion. That case was dismissed, resulted in no conviction.

THE COURT: This is merely an arrest, then?

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MR. DURHAM: Yes, your Honor.

And __

THE COURT: And what's the erasure statute of Connecticut got to do with this?

MR. DURHAM: Because the underlying police reports, court documents, arrest records, et cetera, would be and ought to have been erased pursuant to Connecticut General Statute -- there's an error in the footnotes -- it's 54-142(a), et seq. That is, if somebody is arrested and they are not convicted, then the applicable Connecticut statutes, those matters are all erased so that somebody can't, in fact, have an arrest which resulted in a dismissal then used against him.

So the Government --

THE COURT: But we don't know what that means. That's a very ambiguous formulation, -"can't be used against him."

Do we know what the scope of the erasure statute is? Do we know whether the erasure statute is designed to foreclose the use of information of that sort in a situation such as this?

MR. DURHAM: I believe the erasure statute is directed at official records -- that is, police records, court records, prosecution records, things of that sort.

THE COURT: Does the erasure statute permit the affected party to deny having been arrested without fear of prosecution for perjury? These statutes sometimes are explicit on that point.

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MR. DURHAM: I have to plead ignorance on that. I don't know the answer to your Honor's question.

But the point of the --

THE COURT: Because presumably the matter would come up with a question, right?

MR. DURHAM: Yes, your Honor.

THE COURT: Presumably, the record isn't available, for the reasons you indicate.

MR. DURHAM: Yes, your Honor.

THE COURT: And, therefore, all that defense counsel would have to do is say, "Were you arrested on such and such a date?"

MR. DURHAM: Yes, your Honor.

THE COURT: So the question arises as to whether this defendant in those circumstances is permitted under the law to deny that he was arrested, whether the law would permit him to deny that, or, on the other hand, whether I could foreclose the question by not permitting it to be asked.

MR. DURHAM: Yes, your Honor. And that's the Government's position.

MR. DEVLIN: Excuse me. I think I can help the Court in that regard.

I believe that I am somewhat familiar with that statute, and it does, in terms of employment applications and other

situations, permit an affected person to answer "no" to the question "Have you ever been arrested," without any legal consequences flowing from that.

MR. RUANE: If I may.

THE COURT: All right. I'll hear from defense counsel. Go ahead.

MR. DURHAM: Yes, your Honor. If I could just be heard.

THE COURT: Please.

MR. DURHAM: As set forth in the pleadings, but I'd like to articulate for the record, the admissibility of the type of thing Mr. Ruane is talking about is governed by Rules 608 and 609 of the Federal Rules of Evidence.

609 addresses itself specifically to prior convictions, that is, not arrests, but convictions; and even then the conviction has to have been either for a felony offense or a crime involving dishonesty or false statement. Neither of those predicate matters exist in this case.

So the matter is excludable under 609. With respect to provisions of Rule 608, 608 does provide for inquiries concerning a witness's conduct, provided that the inquiry is probative of truthfulness or untruthfulness. And that's the requirement -- that it go to truthfulness or untruthfulness.

And as Weinstein describes it, "The theory underlying the use of evidence of character or conduct for impeachment purposes is that a person who possesses certain inadequate character traits as evidenced in a variety of ways, including

that he has acted in a particular way, is more prone than a person whose character in these respects is good to testify untruthfully."

Rule 609 permits impeachment of a witness on cross-examination as to the specific instances of misconduct which are clearly probative of untruthfulness.

Now, the nature of the underlying offense involving the arrest, which again resulted in no conviction, was not filing false statements, perjury, giving false statements to a grand jury, fraud, forgery, et cetera. And so, therefore, the Government has set forth, again citing Weinstein and supporting federal cases dealing with the kinds or types of conduct concerning which 608 would allow evidence to come in -- for example, if it were a fraud, or forgery, or making false statements.

And in this instance, that's simply not the case.

THE COURT: Let me just have for the record as much information as you care to give us regarding the matter at issue of the 1982 arrest of Golino.

Do we know whether that matter was nolled or dismissed?

MR. DURHAM: Your Honor, it's my understanding the case was nolled and then dismissed. I inquired.

THE COURT: It was nolled?

MR. DURHAM: Yes, your Honor. As set forth in the Government's pleading, I inquired of Mr. Ruane as to whether he had any indication to the contrary. And at least when I

spoke with him the day before yesterday, he advised me that he did not have any information to the contrary.

So on information and belief, and I would indicate to the Court that we did query the criminal justice records systems and asked Mr. Golino about the matter, there was no conviction:

THE COURT: So you've made inquiries through the normal channels?

MR. DURHAM: Yes, your Honor.

THE COURT: And what you get is zero?

MR. DURHAM: Yes, your Honor. And M. Golino - -

THE COURT: Which is consistent with the way an erasure statute would operate?

MR. DURHAM: Absolutely, your Honor.

MR. RUANE: If your Honor please, just a couple of points.

I issued a subpoena to the Connecticut Records Center for this morning at ten o'clock, and no one has arrived yet, it's almost ten of ten, for the record, if there were any, so that there be a full record before your Honor.

I don't have the return from the person who was serving it because it had not gotten back to my office when I left this morning.

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I would point out a few facts. First of all, that Mr. --

THE COURT: But this does not come as a surprise to you, is that right?

MR. RUANE: That's correct.

THE COURT: That is, you've been thinking about this for some weeks, presumably?

MR. RUANE: Well, for about two days, your Honor.

THE COURT: Two days?

MR. RUANE: Yes.

THE COURT: When did you first learn of this, Mr. Durham?

MR. DURHAM: I learned about it when I read it -- I queried of Mr. Ruane the day before yesterday when I read something in, I think it was the Bridgeport Post indicating that Mr. Golino had been arrested in 1982. That's when I asked Mr. Ruane about any intentions he might have
--

THE COURT: Is that when you learned about it first, Mr. Ruane?

MR. RUANE: Yes.

THE COURT: How is it that the Bridgeport Post is so knowledgeable about these things?

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MR. RUANE: Weil, I guess the First Amendment provides a lot more information somehow in their computers than --

THE COURT: It suggests a degree of interest, curiosity, and tenacity that one doesn't necessarily associate with our local press in matters of this sort.

MR. KELLY: Your Honor, if I may. The erasure statute that has been discussed, 54 --

THE COURT: I'm trying to find out when it is that people had an idea about the 1982 matter. When did we --

MR. KELLY: Two days ago when it was printed in the Bridgeport Post, your Honor.

THE COURT: All right. Fine. Mr. Ruane, why don't you finish.

MR. RUANE: If I may briefly remark. I don't think that the erasure statute would prohibit a federal court from discovering that information. My recollection is there's a case called Penland (sic) vs. Venuti, and I don't have the cite --

THE COURT: Penfield vs. Venuti.

MR. RUANE: Pardon me, your Honor.

THE COURT: By my favorite author.

MR. RUANE: I think that that did discuss it in some way, but I don't have the case in front of me.

THE COURT: Yes.

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MR. RUANE: Mr. Kelly did talk to the witness, your Honor -- or not the witness, did talk to the person who was involved in this event, and he has the full range of facts that we would know that we would want to inquire into. Perhaps your Honor should know that before we go further.

THE COURT: I'm sorry. Give that to me again?

MR. RUANE: Mr. Kelly spoke with the person involved, and so that there are a number of facts your Honor should know before, I think, we go further.

THE COURT: Yes. Mr. Kelly?

MR. KELLY: Your Honor, last night I had an opportunity to speak to a Mr. Anthony Kicska, and I believe the spelling is K-i-c-s-k-a, and he explains somewhat of the in-law relationship described in Mr. Durham's motion. I didn't quite understand what it was.

But in the distant past there was some marriage relationship of brother-in-law, sister-in-law removed, or something like that.

THE COURT: Who is Mr. Anthony Kicska? And why do we care what his views are on any matter?

MR. KELLY: Well, he's the victim of this larceny 1 by extortion.

THE COURT: Okay.

MR. KELLY: Back in 1981 I believe, he had occasion --

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THE COURT: And how did you come to know this?

MR. KELLY: I spoke to him last night.

THE COURT: I understand that. How did you come to call him?

MR. KELLY: Because his name was in the paper.

THE COURT: I see. Okay.

MR. KELLY: And back in 1981 he had occasion to associate himself with Mr. Golino. He didn't explain to me that he was associated through the marriage relationship. He said that he had occasion to do some work around his house, some carpentry, because he was a handy man. He also did some of Mr. Golino's garbage runs for him, but didn't have a taste for that. He needed money. He had some financial problems.

THE COURT: As it were.

MR. KELLY: Pardon?

THE COURT: No, nothing. Go ahead.

MR. KELLY: He had some financial problems himself, and it came to be that Mr. Golino, through an individual named Mr. Caposella, would lend him sums of money, 100, 200, $500 over the course. Every time the money was lent, it was at one hundred percent interest. Every dollar that was lent was repaid to the one.

Came a situation that he had actually had an outstanding bill in the neighborhood of a couple thousand

dollars. He was in his shop in Fairfield. Mr. Caposella appeared at his shop with Mr. Golino and inquired where his money was. Mr. Kicska said he didn't have his money, and Mr. Caposella responded in the presence of Mr. Golino, "If you don't give me my money, I'm going to put a bullet through your head." And Mr. Kicska related to me that all the while Mr. Caposella was explaining this, Mr. Golino was having a good time laughing about it.

Eventually, Mr. Kicska related that he paid what he believed to be the entire amount that was outstanding. However, thereafter, Mr. Caposella and Mr. Golino jointly extorted $10,000 from him. His uncle made the payment, although there was no money due and owing.

Mr. Kicska was so fearful of the situation that he ultimately left the state, and left his wife and children behind.

He did not recall the disposition of the charges, and I'm not questioning Mr. Durham's representation in that regard. He did relate that as a result of this situation, he received $1500 from Mr. Golino and $1500 from Mr. Caposella as restitution.

THE COURT: Fine. Why don't we lay a factual basis here for this matter, perhaps by simply asking Mr. Durham to inquire of Mr. Golino, who is under oath, of course. We can at least get some additional information.

MR. DURHAM: Yes, your Honor.

BY MR. DURHAM:

Q. Mr. Golino, do you recall whether or not, sir, you were arrested in 1982?

A. Yes.

Q. And do you recall what you were charged with?

A. Yes.

Q. And what were you charged with, as best you recall?

A. Extortion.

Q. And in that regard, sir, what, if any, disposition was made of those charges -- that is, what happened in court?

A. They were nolled. I paid $5,000.

Q. All right.

THE COURT: To whom?

THE WITNESS: Pardon?

THE COURT: To whom?

THE WITNESS: Anthony Kicska. If I had lent him $5,000, he said he would paint my house. I did have a canceled check, and I brought it to court to prove I did give him $5,000.

I was going through a divorce. It had to do with my ex-father-in-law. He told me to give him $5,000, and he would give him the money to give back to me, because I didn't have that much in my account. And I was given money back the next day.

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THE COURT: Mr. Durham, would you pursue the somewhat arcane or technical aspects of how the case actually came to be disposed of?

MR. DURHAM: Yes.

BY MR. DURHAM:

Q. Now, Mr. Golino, in 1982 you were arrested in that regard?

A. Yes.

Q. And did the case at some point in time end up in court?

A. Yes.

Q. Are you familiar with the term "nolled"?

A. Yes.

Q. And with respect to the criminal charge, was that charge nolled or not?

A. Yes.

Q. And then as a result of the applicable statutes, was the case then dismissed after thirteen months?

A. Yes.

Q. To your knowledge, sir, did that case result in any conviction, criminal conviction for a felony offense or otherwise?

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A. No.

MR. DURHAM: I don't know whether the Court wants the Government to pursue the facts any further.

THE COURT: Yes. Well, if defense counsel would like to do that, they should feel free to do that now.

MR. RICCIO: May it please the Court.

THE COURT: Mr. Riccio?

You had something you wanted to say. If you care to say it first, or if you want to reserve that --

MR. RICCIO: No, your Honor. We're basically all saying the same thing.

THE COURT: Okay.

BY MR. RICCIO:

Q. Mr. Golino, as you sit here today, do you have any recollection -- well, are you familiar with the term "accelerated rehabilitation"?

A. No.

Q. Okay. Do you know whether or not when the case was disposed of, it might have been disposed of under the theory of accelerated rehabilitation?

A. I still don't understand what you're saying.

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Q. Okay. I presume you had counsel at the time that you went to court?

A. Yes.

Q. And who was that?

A. Attorney Owens.

Q. Howard Owens?

A. Yes.

Q. Okay. And did Mr. Owens ever discuss with you the availability of a pre-trial program known as accelerated rehabilitation wherein if during a specific period of time you don't get in any further trouble, your record is erased?

A. Yes.

Q. He discussed that with you?

A. He told me after thirteen months, he says that everything would be dropped, it would be nolled.

Q. So that I take it then, the area of the accelerated rehabilitation was never discussed with you?

A. By who?

Q. Mr. Owens.

A. I don't think I quite follow what you're saying.

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Q. Okay. I'm just wondering what type of -- did you spend a great deal of time with Mr. Owens in disposing of this case?

A. I spent all the time that we were in court and then afterwards.

Q. All right. Now, when the case was disposed of, was the consent or was the amount of restitution spread upon the record of the court?

THE COURT: In other words, did you go into court and tell the judge and put on the record what you were doing?

THE WITNESS: No, we never went in front of the judge or anything.

THE COURT: You don't recall ever going before a judge?

THE WITNESS: No. We had to bring in -- Mr. Owens was talking to the prosecutor and the Judge, and he come back and then when he says okay, court has been cancelled, come back the following week, he says, and bring the $5,000. And I brought $5,000 to give Mr. Kicska, and that was the end of the case; and he told me at that time that I would -- thirteen months and then everything would be nolled.

THE COURT: In other words, what would happen in thirteen months if you behaved?

THE WITNESS: I wouldn't have a record.

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THE COURT: If you didn't misbehave during thirteen months?

THE WITNESS: Right. Uh-huh.

BY MR. RICCIO:

Q. Did you get a receipt from Mr. Kicska for $5,000?

A. I have a cancelled check.

Q. He accepted it by way of check?

A. Yes.

Q. In the newspaper the other day, there was also an indication that you were arrested for professional gambling at the same time. Is that correct?

A. Yes.

Q. But I take it then, that both charges were disposed of?

A. Pardon?

Q. Both charges were handled by Mr. Owens, and both charges were nolled?

A. The gambling one, I don't know. I think I paid a $200 fine, I'm not sure.

MR. RICCIO: I have nothing further, your Honor.

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MR. KELLY: If I may inquire, your Honor?

THE COURT: Yes.

BY MR. KELLY:

Q. Mr. Golino, I recited a number of facts before. Did you hear those facts clearly?

A. Yes.

Q. Do you admit those facts?

A. Do I admit what facts?

Q. The facts that I previously put on the record.

THE COURT: That's not really quite proper because you recited several facts. Why don't you just ask him what you want to know.

MR. KELLY: Certainly.

BY MR. KELLY:

Q. When you were arrested it was in 1981, is that correct?

A. Yes.

Q. Was Mr. Caposella also arrested?

A. Yes.

Q. Did he also receive the same disposition?

A. Yes.

Q. He paid $5,000, also, to Mr. Kicska?

A. Uh-huh.

THE COURT: You have to say yes or no because --

THE WITNESS: Yes.

THE COURT: -- we can't record hums.

BY MR. KELLY:

Q. How did it come about that you lent money to Mr. Kicska?

A. He worked for a neighbor down the street. He was related to someone in the family, and he had did some work for me inside the house. He had come to me and told me he'd paint my house if I had lent him $5,000. So I had told him that I didn't have the five. Then he kept pestering me, and I says, "Well, you can call up my father-in-law, my ex-father-in-law, because I don't have that kind of money." And he had talked to him. And my ex-father-in-law says to give him the check. I gave him a check, and he gave me the money back the next day.

Q. Didn't that money, in fact, come from Mr. Caposella, not from yourself?

A. No, it didn't.

Q. You just said that you were having serious financial straits in 1981, is that correct?

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A. That's right. The money came from my ex-father-in-law.

Q. Came from your ex-father-in-law?

A. Yes. It was sort of like a setup in a divorce.

Q. Is it also your testimony that's the only money that you lent to Mr. Kicska?

A. Pardon? No. I've lent him money when he worked for me. Instead of paying him, he would have to work. In other words, if he asked for advance in his pay when he worked on the truck, I gave it to him; and when the day came to get paid, he didn't get paid.

Q. And did there come a time, point in time in 1981, where he had an outstanding balance with you of a thousand dollars or so?

A. He didn't have an outstanding balance with me.

Q. Did there come a point in time where you went into his shop, where you visited him with Mr. Caposella?

A. Yes.

Q. What was the reason for that visit?

A. He had borrowed money from Caposella.

Q. Why did you have to go with Mr. Caposella?

A. He didn't know where he lived.

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Q. And did Mr. Caposella, in fact, threaten Mr. Kicska if he didn't repay the money?

A. I don't recall.

Q. So it's your testimony that you lent him $5,000, and that was for him to paint your house?

I don't understand the correlation. Can you explain that?

A. He needed -- he wanted to borrow $5,000. What he needed it for, I don't know. He said he would paint my house. But he would give me my 5,000 back. And he did give me the $5,000 back the next day, as he got it from my ex-father-in-law.

Q. So why did you have to pay him $5,000, for the court proceeding?

A. Because that was the deal that was made.

Q. I thought you didn't owe him any money?

A. I didn't.

Q. But you still agreed to pay him $5,000?

A. That was the option I was given.

Q. Where did that $5,000 come from?

A. It came from my account.

Q. Not from Mr. Caposella?

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A. No, it didn't. I have a G&G canceled check, if you'd like to see it.

Q. Where, when you first lent him the money, how did you lend him that money? Was that cash, or check?

A. That was a check. It was about --

Q. So you have two cancelled checks?

A. It was a cancelled check made out to Mr. Kicska.

THE COURT: Perhaps we should try to limit ourselves to some extent to the nature of the charges, how they were disposed of and what we can find out about that. That's the threshold concern. I've been giving you considerable latitude.

MR. KELLY: I understand.

THE COURT: But I think let's, at least, take care of that material first.

MR. KELLY: I have no further questions in that regard, your Honor.

THE COURT: Mr. Ruane?

BY MR. RUANE:

Q. Mr. Golino, did you loan this Mr. Kicska any money other than that $5,000?

A. I wouldn't say that.

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Q. You tell us, then.

A. He worked for me and gave him an advance in pay, if you want to call that a loan.

THE COURT: Mr. Ruane, as I said to Mr. Kelly, I think we ought to focus on the charges and how they were disposed of, at the threshold.

BY MR. RUANE:

Q. Now, did you ever threaten Mr. Kicska for the repayment of any of the monies, other than the $5,000?

A. No, not me, not at all.

Q. Were you present when someone else did?

A. I don't recall if he did or he didn't.

Q. Were you present when someone else spoke to Mr. Kicska about this?

A. I was present.

Q. And do you have any recollection of anyone else threatening Mr. Kicska?

A. No, you're talking about seven years ago.

THE COURT: All right. I've heard enough. If you have no other questions regarding the charges, the disposition of the charges, or things of that sort, we'll take a brief recess to consider this brief and to consider the possible relevance of Penfield vs. Venuti.

Yes, sir?

MR. RICCIO: Your Honor, may I ask one more question?

THE COURT: Please.

MR. RICCIO: Would I be permitted to ask it from here?

THE COURT: Yes.

BY MR. RICCIO:

Q. Mr. Golino, when Mr. Owens indicated to you that if you paid back Mr. Kicska $5,000, the cases -- your cases would be disposed of, did you indicate to him, "but I don't owe him $5,000"?

A. I did.

Q. But he said that's the way it has to be disposed of, and you agreed?

A. Yes.

Q. I mean, you didn't pay $5,000 to Mr. Kicska in order to have a convenient lapse of memory, did you?

A. No.

MR. RICCIO: No further questions, your Honor.

THE COURT: Mr. Ruane?

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MR. RUANE: Your Honor, the purpose of the inquiry, just so that your Honor will know, is this: that an essential element here is fear and the state of mind of this witness. And this evidence would be probative of that area if, in fact, he was present. If the jury heard this evidence, they could make the decision whether or not this man feared anything from any of these defendants.

THE COURT: Well, we're not really dealing with state of mind right now. We're dealing with the admissibility of any such information, or any record, or any such inquiry.

MR. RUANE: Yes. And I just wanted your Honor to know that other than on a question of impeachment by a conviction or an arrest, we also claim this additional basis. And there is a case that talks about this to some degree, I just wanted to give your Honor the cite: United States vs. Calle, C-a-l-l-e, I believe it's 822 F.2d at 1020-1021.

MR. RICCIO: Your Honor, I know that it's pretty much hornbook law that any crimes involving a larceny or larcenous intent, of which larceny by extortion under the Connecticut General Statutes is one, would go to impeach a person's credibility. And I think on that theory, I don't know what this other case Mr. Ruane just cited stands for, but in reference to the larceny aspect of it and the lack of credibility aspect of it, I would submit that on that theory it should be admissible.

THE COURT: Tell me, Mr. Ruane, how do you come about Penfield against Venuti?

MR. RUANE: Your Honor, only by my recollection, when I was doing a brief to the Connecticut Supreme Court about section 54-142.

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THE COURT: All right. Okay.

MR. RUANE: Yes, sir, just my recollection.

MR. DURHAM: Several matters, your Honor.

I think, first of all, with respect to Mr. Ruane's claim -- well, it might go to intent or fear -- the point is, the admissibility of the kind of thing that he's talking about is specifically governed by 608.

So it may very well be that he would like to muddy the witness up, but he can't do it unless it falls within the provisions of the respective Rules of Evidence.

Secondly, with respect to Mr. Ruane's -- withdrawn. With respect to Mr. Riccio's suggestion about larceny and whatnot, I think a review of the Connecticut statutes would indicate that there are obviously different kinds of larceny, and I would suggest to the Court there's a distinction between somebody who, for example, is embezzling monies or stealing money, and the kind of thing that the statute covers with respect to alleged extortions.

And, finally, Mr. Ruane handed to me a subpoena which he apparently issued to the state police, and the state police have, in response to that subpoena, delivered a certified copy of a criminal record of Eugene P. Golino.

THE COURT: Did that just arrive?

MR. RUANE: Yes.

MR. DURHAM: Yes, your Honor. And I would ask that it be marked as a court exhibit, or however the Court

would prefer. It reflects no convictions other than a professional gambling charge. The disposition was a $200 fine, as Mr. Golino testified to.

Does the Court want to have this marked as a Court exhibit?

THE COURT: Yes. Fine.

MR. DURHAM: And, finally, your Honor --

THE COURT: Absent objection.

MR. RUANE: No.

THE COURT: It will be marked as a Court exhibit. Number 1?

THE CLERK: It's 3, your Honor.

THE COURT: 3.

MR. DURHAM: And, finally, your Honor, I would suggest to the Court that what the Court has heard thus far points out the wisdom of Rule 608 in this respect. Rule 608 specifically excludes the introduction of extrinsic evidence relating to the kind of conduct covered by the Rule. And I think as the Court can see from the little bit it has had an opportunity to hear, this is not some clear-cut case, and there would be no extrinsic evidence which could be introduced, for example, through Mr. Kicska, and there's no basis for its admissibility.

I don't believe the purpose of this proceeding is to get into the domestic relations of Mr. Golino and former in-laws.

Appendix C
Excerpts of Trial Transcript with Opinion
of United States District Court

THE COURT: All right. Let me, before recessing, note the instruction that I propose to give to the jury after Mr. Durham has asked the question that he intends to ask of Mr. Golino regarding the excerpt in the transcript that we reviewed yesterday in which Mr. Golino inquires of Romano regarding drug dealing. The assumption is that Mr. Golino will limit himself to answering that FBI agents had asked him to inquire of Romano regarding drug dealing.

After he has answered that question in the way that we expect he would, I would propose to instruct the jury as follows:

"Members of the Jury, this case does not involve allegations of drug transactions or drug use. These defendants are not charged with trading or dealing in drugs. You are to draw no inference whatsoever from evidence that FBI agents asked Golino to inquire of Romano regarding drug dealing."

MR. DURHAM: The Government has no objection to that charge, your Honor.

MR. RUANE: I'm troubled by the word that they are to draw no inference at all.

THE COURT: You want them to draw inferences against your client?

MR. RUANE: Well, I don't know if that --

THE COURT: Is that your preference?

MR. RUANE: No, no, no. No, your Honor. I withdraw my comment. I'll withdraw it.

Appendix C
Excerpts of Trial Transcript with Opinion
of United States District Court

THE COURT: Fine.

Mr. Riccio, this may address some of your concerns because I'm emphasizing to some extent the inquiry of the narrowness of the inquiry.

MR. RICCIO: Yes, your Honor, and I do think that permitted me to ask the question on cross-examination, "Was Mr. Iannucci's name ever mentioned to you."

THE COURT: Yes. And I propose to permit that question.

MR. RICCIO: Then I would have no objection to the instruction.

THE COURT: Fine. I hear no other comments regarding the proposed instruction, so I assume there are no objections.

We'll take a brief recess to deal with this other question.

(Short Recess)

THE COURT: I've had a chance to consider the Government's Motion in Limine re: impeachment of Eugene Golino and the authorities brought to our attention there, and to review, also, Penfield vs. Venuti, 589 F. Supp. 250, (District of Connecticut 1984), especially pages 253 and 254, as well as the earlier decision in Penfield vs. Venuti; and based on all of the authorities relied upon by the Government, as well as by this Court in the Penfield cases, I am persuaded that the Government's Motion in Limine re: Impeachment of Eugene P. Golino ought to be granted, and it is granted. So ordered.

Appendix C
Excerpts of Trial Transcript with Opinion
of United States District Court

The net effect of this is that inquiries on this matter shall be foreclosed.

Let's bring in the jury.

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APR 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1459

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL VINCENT LANESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the limitations placed on petitioner's cross-examination of a government witness violated the Confrontation Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 890 F.2d 1284.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1989. A petition for rehearing was denied on January 17, 1990. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of conspiracy to use, and one count of using, extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894(a)(1). Petitioner was sentenced to 78

months' imprisonment, to be followed by a three-year term of supervised release. He was also fined $25,000. The court of appeals affirmed. Pet. App. 1a-19a.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and his co-defendants Thomas Romano and Joseph Iannucci conducted bookmaking operations in the Bridgeport, Connecticut, area. In November 1987, Eugene Golino, who had been a frequent bettor with the defendants' bookmaking operations, incurred gambling losses of more than $80,000 to petitioner and his co-defendants. On December 18, 1987, Golino met with Romano at a Bridgeport diner and gave him $5,000 in partial payment for the debt. Romano then telephoned petitioner, who arrived at the diner a few minutes later. Petitioner, who was carrying a handgun, forced Golino to sign a promissory note for $80,000, payable to petitioner. Pet. App. 4a-5a; Gov't C.A. Br. 5-6.

Shortly after that meeting, Golino began cooperating with the FBI. Over the next month, he recorded several conversations with Romano in which Romano said that Golino would be harmed or killed if he did not pay his debts. On January 29, 1988, Golino met with petitioner and Romano at a Bridgeport park. Petitioner grabbed Golino by the throat, pushed him against a fence, and threatened to kill Golino if he did not pay the money he owed on the gambling debt. Pet. App. 5a.

2. At trial, the government filed a motion in limine to bar the defense from cross-examining Golino regarding the circumstances surrounding Golino's 1982 arrest by Connecticut authorities for larceny by extortion. The government stated that the charges had been dismissed and that the records of the arrest had been erased pursuant to Connecticut law. The government argued that inquiry into the incident was barred by Federal Rules of Evidence 608(b) and 609. Pet. App. 25a-31a.

Defense counsel claimed that the incident was proper material for cross-examination. According to defense counsel, in 1982 Golino, through his father-in-law, had made loans at 100% interest to a man named Anthony Kicska. Defense counsel asserted that when Kicska could not repay the loans, Golino's father-in-law threatened Kicska in Golino's presence; Golino was purportedly amused by the threats. Pet. App. 34a-36a.

To clarify the facts regarding the incident, the district court had the parties conduct an extensive voir dire of Golino outside the presence of the jury. Golino testified that he had lent $5,000 to Kicska at the behest of his father-in-law, that his father-in-law had repaid him immediately, and that he had accompanied his father-in-law to see Kicska about the debt. Golino said he could not recall that Kicska was threatened. He also stated that he had paid Kicska $5,000 as a way of settling the criminal charges, and that the charges were then dropped. Pet. App. 6a, 36a-49a. After hearing Golino's testimony and argument by defense counsel and the government, the district court granted the government's motion in limine. Pet. App. 50a-55a.

3. The court of appeals rejected petitioner's contention that the curtailment of his cross-examination of Golino violated the Confrontation Clause.[1] Petitioner argued that the 1982 incident would have been relevant to show that Golino approached the FBI in the hope of obtaining restitution for his gambling losses; petitioner's theory was that

[1] The court similarly rejected co-defendant Romano's claim that cross-examination of Golino on the 1982 incident was necessary to allow the jury to assess Golino's credibility. The court stated that the jury had sufficient information to consider Golino's credibility in light of the testimony that Golino was in the federal witness protection program, had been paid by the government in exchange for his cooperation, and had been granted immunity from state or federal gambling prosecutions. Pet. App. 7a.

Golino would therefore have had a motive for exaggerating or fabricating petitioner's use of violence to attract the FBI's attention. The court of appeals found petitioner's theory of bias too strained, because it was "highly improbable" that Golino would have thought he could obtain restitution by cooperating with the authorities as Kicska apparently had done six years earlier. Pet. App. 7a. The court pointed out that the circumstances of the two events differed significantly, in that Kicska's debt was unrelated to illegal gambling, and that the prior dispute, unlike Golino's dispute with petitioner, involved relatives or acquaintances. The court also noted that petitioner's theory of bias was undercut by the fact that the threats of violence used against Golino in this case were corroborated by other evidence, including taped conversations. Accordingly, the court found no Confrontation Clause violation. Pet. App. 7a.[2]

ARGUMENT

Petitioner renews his contention (Pet. 6-18) that the district court violated the Sixth Amendment by refusing to permit cross-examination of Golino regarding the 1982 incident. He claims that cross-examination on that issue would have revealed Golino's bias or motive in favor of the government and would have undermined Golino's credibility. The court of appeals properly rejected that claim, and its fact-bound holding does not merit this Court's review.

In *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), the Court held that a defendant's confrontation rights are

[2] The court of appeals also held that the district court did not err by denying petitioner's motion for severance, by admitting evidence of uncharged misconduct against petitioner's co-defendant, or by declining to instruct the jury on single versus multiple conspiracies. Pet. App. 8a-9a. The court of appeals, however, vacated petitioner's sentence and remanded the case for resentencing because the district court had not made findings to support the sentence. Pet. App. 16a-19a.

violated when he is denied all cross-examination regarding an event that "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* at 679. The Court made clear, however, that the defendant's right to cross-examine is not absolute. The Court explained: "[T]rial judges retain considerable latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.* See also *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

This Court has thus recognized that not every claim of bias requires the district court to grant the defendant's request for unrestricted cross-examination; the line of cross-examination must at least be marginally relevant. See also *United States* v. *Williams*, 877 F.2d 516, 519 (7th Cir.) ("The Sixth Amendment * * * guarantees a defendant the opportunity for *effective*, not limitless, cross-examination."), cert. denied, 110 S. Ct. 180 (1989). The facts of the *Van Arsdall* case illustrate the point. In *Van Arsdall*, the defendant was disallowed from questioning a witness about the dismissal of criminal charges against him in exchange for his agreement to discuss a murder with the prosecutor. On those facts, the Court found a violation of the defendant's confrontation rights because the "cross-examination [was] designed to show a prototypical form of bias on the part of the witness." 475 U.S. at 680.[3]

Unlike the classic form of impeachment that was denied in *Van Arsdall*, the line of cross-examination that petitioner desired to pursue was properly found by the court of appeals to lack probative value on the issue of bias. Petitioner

[3] The Court went on to hold that the confrontation violation should be assessed under the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). 475 U.S. at 680-684.

contends that Golino's 1982 involvement with Kicska, in which Kicska obtained restitution after complaining to the authorities about Golino and his father-in-law, somehow provided Golino with a motive to go to the FBI in the hope of obtaining relief from his gambling debts and gaining restitution from petitioner and his co-defendants.[4] As the court of appeals explained, however, that claim is "highly improbable" because the two situations differ so markedly in the relationship of the parties and the nature of the underlying transactions. From the sketchy and confusing facts elicited on voir dire, it appears that Golino and Kicska were related by marriage, and the loans between them did not stem from an illegal gambling scheme. In that context, it is no surprise that the dispute was resolved by a simple agreement to make restitution.

In contrast, Golino's relationship to petitioner was as a debtor resulting from illegal gambling activities; as the jury was told, one of the benefits for Golino of co-operating with the government was immunity from prosecution on gambling charges. Pet. App. 7a. Given Golino's own involve-

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[4] We note that petitioner has considerably shifted his grounds from those he urged in the district court for desiring to cross-examine Golino about the 1982 incident. In the district court, the defense urged that "the purpose of the inquiry * * * is this: that an essential element here is fear and the state of mind of this witness. * * * If the jury heard this evidence, they could make the decision whether or not this man feared anything from any of these defendants." Pet. App. 50a. When the district judge dismissed that contention, defense counsel moved on to the backup point that the crime of larceny was relevant to Golino's credibility. *Ibid.* In this Court (Pet. 15-16), as in the court of appeals (Pet. C.A. Br. 28-29), however, petitioner has made the quite different argument that Golino's prior experience with Kicska served as a sort of model for his cooperation with the government. Petitioner's current theory is that just as Kicska had obtained restitution by going to the police, Golino might have surmised that he could obtain restitution by going to the FBI.

ment in illegal activities, he could hardly have relied on Kicska's experience as a basis for expecting restitution. In short, because the jury could not reasonably have concluded that the 1982 incident would have motivated Golino to slant his testimony in the government's favor, cf. *Van Arsdall*, 475 U.S. at 679, there was no error in precluding cross-examination into it.[5]

Similarly, contrary to petitioner's suggestion (Pet. 16-18), cross-examination regarding the 1982 incident was not proper as a means of attacking Golino's credibility. Under Federal Rule of Evidence 608(b), a district court has discretion to permit cross-examination into specific instances of the conduct of a witness for the purpose of attacking the witness's credibility when the conduct is "probative of truthfulness or untruthfulness." Rule 608(b) "is intended to be restrictive" and does not permit inquiry into "[c]rimes primarily of force or intimidation." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 608[05], at 608-46 to 608-49 (1988). In this case, Golino was charged with larceny by extortion, a crime of force and intimidation, not a crime of untruthfulness. Thus, the district court did not abuse its discretion by foreclosing cross-examination on the 1982 incident.

In any event, as the courts of appeals have recognized, the Confrontation Clause is not violated by the curtailment of cross-examination as long as the jury receives sufficient information to make a discriminating appraisal of the witness's motives for testifying for the government. See

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[5] Also casting doubt on the attenuated inferences that petitioner would draw from the 1982 incident is the fact that a far more obvious motive existed for Golino to cooperate with the government: the desire for protection from petitioner and his co-defendants and for immunity from prosecution. As the court of appeals noted, Pet. App. 7a, the threats of violence against Golino were amply established by the evidence.

United States v. *Blanco*, 861 F.2d 773, 781 (2d Cir. 1988) (finding no confrontation violation in denial of a line of cross-examination when "the jury had considerable information which enabled it to appraise Caban's credibility and possible motives for testifying falsely"), cert. denied, 109 S. Ct. 1139 (1989); *United States* v. *Klauer*, 856 F.2d 1147, 1149 (8th Cir. 1988) (finding no violation in denying cross-examination about the specifics of sentencing concessions by the prosecutor when the defendant had "more than ample opportunity to cross-examine Bradley as to his bias, motive and overall unreliability as a witness"); *United States* v. *Calle*, 822 F.2d 1016, 1020 (11th Cir. 1987) ("[A] trial judge may limit cross-examination without infringing the defendant's sixth amendment rights where '(1) the jury, through the cross-examination permitted, was exposed to facts sufficient for it to draw inferences relating to the reliability of the witness; and, (2) the cross-examination conducted by defense counsel enabled him to make a record from which he could argue why the witness might have been biased.' ").

In this case, the prosecutor elicited from Golino that he was in the federal witness protection program, that he had received money from the government through his participation in that program, and that he had agreed to testify at trial when he was accepted into the program. On cross-examination, Golino testified to the amount of money that he received from the federal government in payments and rent subsidies. Defense counsel also elicited that Golino was not subject to prosecution for his gambling offenses, that he was a compulsive gambler, that he deferred paying his legitimate creditors because of his gambling debts, and that while gambling he had owed money to the government for back taxes. Pet. App. 7a; Gov't C.A. Br. 18. These facts gave the jury an ample basis for assessing Golino's motives

for testifying, his credibility, and the possibility that he was biased in favor of the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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